Supreme Court, U.S.
F I L E D
AUG 19 1999
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No. 98-1880

IN THE

Supreme Court of the United States

NIKKI LEADER,

Petitioner,

v.

SCHOOL BOARD OF THE PARISH OF LIVINGSTON, LOUISIANA; J. ROGERS POPE and J. LLOYD WAX,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Nikki Leader sued the Livingston Parish School Board and two of its administrators, J. Rogers Pope and J. Lloyd Wax, generally alleging gender discrimination with the severance of her employment from the Livingston Parish school system. The EEOC reviewed the case and issued a Right to Sue Letter on June 12, 1997. Ms. Leader filed suit on September 9, 1997, the eighty-ninth day after the issuance of the Right to Sue Letter.

Service of the Complaint, however, was not attempted until January 13, 1998, more than 120 days after filing suit, when Ms. Leader mailed the Summons and the Complaint to the defendants. Ms. Leader did not apply for an extension of time to accomplish service.

The delay in service resulted from a series of errors by Ms. Leader's counsel. When the Complaint and Citation were originally sent to counsel for service in September, 1997, they were inadvertently put away in a file cabinet without any attempt at service. On December 11, 1997, still within the service period, Ms. Leader's counsel failed to appear at a scheduled status conference. The following day, December 12, the Magistrate ordered Ms. Leader to appear for a sanctions hearing.

Rather than serving the suit at that point, counsel chose to await the Magistrate's ruling on the sanctions hearing. The Magistrate ruled on the sanctions hearing on January 6, 1998, and relieved Ms. Leader from any further obligation for failing to appear at the status conference.

It was then, on January 13, 1998, that Ms. Leader attempted service for the first time by mailing the Complaint and Citation to the School Board defendants. The mailing came more than 120 days after filing the original Complaint.

The defendants, Livingston Parish School Board, J. Lloyd Wax, and J. Rogers Pope, filed a Motion to Dismiss for failure to timely serve under FRCP Rule 4(m). The court set the matter for hearing on April 3, 1998 at 10:00 *a.m.*

Ms. Leader filed no opposition to the Motion to Dismiss in advance of the hearing. Rather, she filed her opposition at 4:00 *p.m.* on the day of the hearing. The trial court had ruled on the Motion on April 2, 1998, after receiving no opposition as required by local court rule.

Ms. Leader then filed a Motion for Reconsideration. The trial judge considered all of Ms. Leader's arguments purportedly excusing her failure to serve. The district judge found lack of good cause, Ms. Leader having shown nothing more than a series of mistakes by her counsel. After considering all of the relevant facts and circumstances, the court further determined that discretionary factors did not favor Ms. Leader's plea for an extension of the service deadline. The court denied the reconsideration.

On appeal to the Fifth Circuit Court of Appeal, the court determined that the district court did not abuse its discretion under the peculiar circumstances of the case. On February 12, 1999, the Fifth Circuit affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

Rule 4(m) requires service within 120 days of the filing of the Complaint. A plaintiff's failure to timely serve the Complaint results in dismissal without prejudice, unless the plaintiff can show "good cause" for the delay or the trial court exercises its discretion to extend the service delay. *Thompson v. Brown*, 91 F.3d 20 (5th Cir. 1996). Ms. Leader did not serve the Complaint within 120 days and concedes that she did not even mail service until after the 120 days had expired. The delay was attributable to a series of errors by her counsel.

The district judge found on original hearing on the Motion to Dismiss that the plaintiff made no showing of good cause. She did not file an opposition to the motion and so provided no factual basis for the trial court to find good cause for the delay. On Reconsideration the court considered Ms. Leader's evidence and found that her mere showing of a series of mistakes on the part of her counsel was insufficient grounds to alter or amend the original judgment. The district judge then declined to exercise its discretion to extend the time for service because Ms. Leader attempted mail service only after the 120 day period had expired.

The district court did not err in finding that Ms. Leader failed to show good cause for her failure to attempt service timely. Measured by the standard of *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380, 1113 S. Ct. 1489 (1993), Ms. Leader cannot seriously argue that the sum of her counsel's errors amounts to "excusable neglect".

Nor did the district court abuse its discretion by determining that the admittedly harsh consequences of dismissal were outweighed by the prejudicial effect upon the defendants and the administration of justice in the district court.

I.

DETERMINING "GOOD CAUSE" UNDER THE *PIONEER* STANDARD

Ms. Leader argues that Rule 4(m)'s "good cause" provisions for delaying service should be judged by the standards of *Pioneer Inv. Services v. Brunswick Associates*, 507 U.S. 380, 1113 S. Ct. 1489 (1993), and *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998).[1] Assuming the application of the *Pioneer* standard to the facts of this case, the trial court considered all of the factors — factual, legal, and equitable — relevant to an assessment of "good cause" and found that Leader had not shown a good reason for the service delay. The trial court's determination is consistent with *Pioneer* and with Fifth Circuit decisions on "excusable neglect".

In the *Pioneer* case, a creditor's lawyer, newly hired after the issuance of filing schedules, overlooked a bar date obscurely stamped in the corner of one of the bankruptcy notices. The creditor did not file its claim within the bar date, and the Bankruptcy Court disallowed the claim.

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1. A strong argument can be made that "good cause" under Rule 4(m) may be judged by a stricter standard than *Pioneer* and *Halicki*. The courts have long held that "good cause" under Rule 4(m) requires **at least** as much as would be required to show excusable neglect. On that basis, the Tenth Circuit recently held that "good cause" under former Rule 4(j) is judged by a different standard than "excusable neglect". *In Re Kirkland*, 86 F.3d 172 (10th Cir. 1996), citing *Winters v. Teledyne Movible Offshore, Inc.*, 776 F.2d 1304 (5th Cir. 185). Nonetheless, for purposes of this case, argument is made upon the "more flexible" standard of *Pioneer*.

On review, this Court noted that Bankruptcy Rule 9006(b)(i) allows a court to extend the time established as a bar date upon a showing of "excusable neglect". The court then went on to establish a flexible, equitable standard to measure "excusable neglect" under Rule 9006(b)(i) to include such factors as danger of prejudice to the defendant, length of delay and potential impact on judicial proceedings, the reason for the delay including whether it was in the control of counsel, and whether the movant acted in good faith.

In *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998), the Fifth Circuit applied the *Pioneer* standard in a civil context where plaintiff's counsel untimely filed a motion to alter or amend a grant of summary judgment under Rule 59(e) and allowed the 30 day appeal delay to run, believing that the filing of the Rule 59(e) motion had suspended the delay for appeal. The plaintiff sought to excuse the untimeliness of the 59(e) filing on the grounds that his counsel mistakenly thought that the mailing of the Judgment enlarged Rule 59(e)'s ten day delay. The trial court found no excusable neglect under Rule 4(a)(5) and dismissed the appeal on the summary judgment.

Consistent with *Halicki* and prior jurisprudence, the Fifth Circuit found nothing in the instant case to warrant reversal. Ms. Leader filed her Complaint on September 9, 1997. She had 120 days to effect the service, which would have run on January 7, 1998. However, when the service copies arrived in her counsel's office approximately one week after filing, they were put away in a filing cabinet. Counsel also failed to calendar a status conference on December 11, 1997, well within the 120 day service period.

On December 12, 1997, the Magistrate rang the alarm bell and brought to counsel's attention the failure to meet deadlines. The Magistrate noticed a sanctions hearing within 10 days. Ms. Leader's counsel recovered the service documents from the file cabinet. But, rather than serving the suit at that juncture, plaintiff's counsel elected to await the outcome of the Magistrate's sanction hearing. By the time the hearing was concluded, the service delay had run without Ms. Leader even attempting service.

When Ms. Leader finally mailed service on January 13, 1998, she was outside the 120 day service period. She could easily have rectified the service error after December 12, 1997, by appointing a process server. These defendants are not hard to find. They are the School Board, Superintendent of Schools and the school principal where Leader worked for 18 years.

On January 30, 1998, when the School Board defendants filed a Motion to Dismiss for Failure to Serve Defendants Timely Under FRCP 4(m), Ms. Leader filed no opposition to the Motion to Dismiss. She did not provide the trial court with any argument or any factual basis for finding "good cause" for the delay.[2]

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2. Ms. Leader filed an Opposition to the Motion to Dismiss only at 4:03 p.m. on the afternoon of the April 3rd hearing, even though the hearing was scheduled for 10:00 a.m. By then, the court had ruled dismissing the Complaint. Ms. Leader argues that she felt like enough was in the record, and no opposition was needed. It should be noted that the only facts in the record at that point were that Ms. Leader's counsel failed to attend a scheduled status conference because she had not placed the conference on her calendar.

The record also reflects that Ms. Leader had an unusually long time to develop her claim. She left her employment with the defendants in August, 1995, and filed an EEOC claim within a few months after. A right to sue letter did not issue until June, 1997. Unlike most claimants who have one year from the precipitating events in which to file suit, Ms. Leader had more than two.

By the same token, the defendants were further removed from the events of the suit by the time service was made. During the 120 day service period, the Denham Springs High School administration building burned with the loss of the school's administrative records, many germaine to this case.

All of those facts were before the district judge when he dismissed the suit.

On rehearing, the district court considered all of the factual and equitable points raised by Ms. Leader and found no grounds for changing its prior ruling. Ms. Leader had not demonstrated "good cause" for untimely service but had "merely shown a series of mistakes on the part of her counsel".

Parties in litigation are held accountable for the acts and omissions of their attorneys. A plaintiff cannot avoid the consequences of the acts of her chosen counsel on the grounds that counsel's conduct would prejudice her rights. *Pioneer* at 1499, citing *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386 (1962).

It is a rare case, indeed, where the misinterpretation of a federal rule qualifies as excusable neglect. *Halicki v. Casino*

Cruises, Inc., 151 F.3d 465 (5th Cir. 1998); *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350 (5th Cir. 1993).

Ms. Leader suggests in her application for writs, that the Magistrate's relieving her of sanctions for the failure to attend the December 11th status conference should excuse her failure to effect service of the Complaint. That argument turns the law on its head and makes one error in following the federal rules justification for violating another. Even if Ms. Leader's initial error in filing away the service copies were excusable, her delay following the December 11, 1997, status date is not. Failing to even attempt service in the wake of the Magistrate's Order on December 12, 1997, hardly improves Ms. Leader's position.

Ms. Leader also improperly cites an off-hand remark by the Magistrate that the lack of service is moot once the defendants become aware of the suit and attend a status conference. It is patently unfair to the Magistrate to infer or imply that she made any finding on the service issue. Nothing in the record suggests that the Magistrate made any determination concerning the delay in service, and Leader's argument in that regard is inappropriate.

Otherwise, Ms. Leader points to nothing in the record to support a finding of "good cause" under Rule 4(m).

II.

THE TRIAL COURT'S REFUSAL TO EXTEND THE TIME FOR SERVICE

The trial judge did not arbitrarily deny Leader's plea for a discretionary extension of the service period. The 1993 amendment to Rule 4(m), indeed, contains a "mercy" provision, which gives a district court discretion to extend the time for service even in the absence of "good cause". Whether the claim will be time-barred is one factor to be weighed heavily in the exercise of the court's discretion. However, the discretionary provision is not a license to disregard the service delay with impunity. Rather, the courts must balance the interest in the administration of justice, possible harm to the function of the courts in enforcing the federal rules, potential prejudice to the defendant, and the nature of the delay.

The district court here considered Ms. Leader's arguments in that regard and found dismissal to be appropriate under the circumstances. Service was not a "near miss" as Ms. Leader suggests. Ms. Leader had an opportunity to atone for her original error in filing away the service documents when the court brought matters to her attention on December 12, 1997. She chose, instead, to wait. She did not even mail service until the 120 day period had elapsed. Leader then chose to rest upon facts in the record (though adverse to her) rather than filing an opposition to the Motion to Dismiss.

The district court was not wrong to consider such disregard of the federal rules and the administration of the court to outweigh the adverse impact of dismissal upon the plaintiff. Unless this Honorable Court is prepared to adopt an absolute rule that all untimely served claims are shielded from dismissal if time-barred upon refiling, the district court's discretion should be upheld.

CONCLUSION

Ms. Leader does not present a compelling case for overturning the district court or the appellate court's decision. She made no showing of good cause on original hearing on the Motion to Dismiss. She did not provide a reasonable basis for changing the original decision On Reconsideration. She advanced no viable legal argument for reversal. The circumstances surrounding her failure to serve timely do not constitute "good cause". If such amounts to good cause for the failure to serve, there can hardly be a case where a plaintiff will lack good cause.

The events giving rise to the suit occurred more than two and one-half years before notice to the defendants, and a fire burned the school administration building where essential records were kept during the 120 day service period. The lower courts were not wrong to dismiss the suit for failure to timely serve. Accordingly, the School Board defendants respectfully ask that the Court reject Ms. Leader's application.

Respectfully submitted,

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